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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

ASGROW SEED COMPANY,
Petitioner,
v.

DENNY WINTERBOER and BECKY WINTERBOER,
d/b/a DEEBees,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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No. 92-2038

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Pursuant to Rule 25.5 of the Rules of this Court, Petitioner Asgrow Seed Company ("Asgrow") submits this supplemental brief to inform the Court of recently enacted legislation that prospectively amends the statutory provisions at issue in this case, but does not affect the issues before the Court.

This case presents two statutory interpretation questions arising from the Plant Variety Protection Act ("PVPA"), 7 U.S.C. §§ 2321-2581. The first question is how much seed of a novel plant variety protected under the PVPA may be sold for reproductive purposes under the terms of 7 U.S.C. § 2543. The second question is whether the seed sales authorized by section 2543 (whatever that amount is held to be) remain subject to the requirement in 7 U.S.C. § 2541(6) that notice be given to the pur-

chaser that the seed being sold is of a protected novel variety.

In its opening brief on the merits, Asgrow noted that legislation had been introduced to amend the PVPA "to make such Act consistent with the International Convention for the Protection of New Varieties of Plants of March 19, 1991, to which the United States is a signatory, and for other purposes."¹ Pet. Br. 42-44. At that time, Asgrow noted that the proposed legislation provided that "[t]he first sentence of section 113 (7 U.S.C. § 2543) is amended by striking 'section: *Provided*, That' and all that follows through the period and inserting 'section.'." Pet. Br. 42.

On October 6, 1994, the President signed into law the Plant Variety Protection Act Amendments of 1994, Pub. L. No. 103-349, 108 Stat. 3136 ("the 1994 Amendments"). Section 10 of the 1994 Amendments prospectively amends 7 U.S.C. § 2543, the statutory provision in this case, in the exact manner explained above. By striking that proviso from section 2543, the 1994 Amendments eliminate the statutory basis under which farmers can sell PVPA-protected seed to other farmers for reproductive purposes without authority from the certificate owner.

The 1994 Amendments do not affect any existing PVPA certificates, including the two Asgrow soybean varieties at issue here. Section 14(a) of the 1994 Amendments states:

Except as provided in this section, any variety for which a certificate of plant variety protection has been issued prior to the effective date of this Act, and any variety for which an application is pending on

* The International Convention for the Protection of New Varieties of Plants, Mar. 19, 1991 is known by the French acronym "UPOV." Article 14(1) of the 1991 UPOV requires that there be authorization of the owner before the seed of a protected plant variety may be offered for sale.

the effective date of this Act, shall continue to be governed by the Plant Variety Protection Act, (7 U.S.C. § 2321 et seq.), as in effect on the day before the effective date of this Act.

In addition, section 15 provides that "[t]his Act and the amendments made by this Act shall become effective 180 days after the enactment of this Act." Thus, the 1994 Amendments are prospective only with respect to the issues presented by this case and do not render the present case moot or insignificant.

The pendency of the bills leading to the recently-enacted legislation was fully discussed in the Government's amicus curiae brief filed in support of Asgrow's petition prior to this Court's grant of certiorari. At that time, the United States recognized that the prospective nature of the bills that later resulted in the 1994 Amendments did not undermine the need for review by this Court of the issues presented by this case. *See* Brief of United States as Amicus Curiae [petition stage], at 18 ("even if the bills are enacted in their present form, further review of the decision below would be warranted").

In practical effect, Congress has created *two* applicable versions of the PVPA, at least until the expiration of the 18-year term of all PVPA certificates that are pending on or issued before April 4, 1995, *i.e.*, 180 days after the enactment of the 1994 Amendments. It is estimated that there are approximately 3500 issued PVPA certificates that remain subject to the present version of the Act. Pet. Br. 44 & n.32. Those issued certificates include the leading soybean, cotton, wheat, and other PVPA-protected varieties currently being marketed and planted throughout the country. Thus, the legal issues presented by this case remain of critical importance to American agriculture and the private seed breeding industry. *See* Brief of United States as Amicus Curiae [petition stage], at 19 ("decision below will have a continuing adverse impact on the breeders of novel varieties for years to come").

This case is scheduled for oral argument on Monday, November 7, 1994. Because copies of the official printed version of the 1994 Amendments as signed by the President are not yet available from the Government, 40 copies of the 1994 Amendments as reported in the WESTLAW™ computer data base have been transmitted with this brief in accordance with instructions received from the Office of the Clerk of the Court.

Respectfully submitted,

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